National Express Corp. d/b/a ATC/Forsythe & Associates, Inc. *and* Lino (George) J. Lima and Eugene McGiffin. Cases 28–CA–17291 and 28–CA–17667

March 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 27, 2002, Administrative Law Judge James L. Rose issued the attached decision. The Charging Parties filed exceptions and a supporting brief. The Respondent filed a motion to strike the Charging Parties' exceptions.[1] The Respondent's answering brief was rejected as untimely.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[2] and conclusions and to adopt the recommended Order.

For the reasons he states and as further explained, we affirm the judge's finding that neither George Lima nor Eugene McGiffin was discharged in violation of the Act. We also find that McGiffin was not illegally interrogated by Mark Ward, the Respondent's General Manager.

BACKGROUND

The Respondent is a transit company under contract with the City of Tempe, Arizona. In 2000, Amalgamated Transit Workers Union, Local 1433 (the Union) began an organizing campaign that culminated in its certification as the exclusive representative of the Respondent's unit employees on January 11, 2001. Following negotiations, the parties reached a collective-bargaining agreement on January 20, 2002.

Charging Parties Lima and McGiffin were active and open participants in the Union's organizing campaign in the summer and fall of 2000. On July 17, 2000, they filed an unfair labor practice charge alleging that antiunion statements were made during the campaign by Reno Navarette, the Respondent's regional vice president. The charge was dismissed pursuant to a Board settlement.

In June or July 2000, McGiffin, Lima, and two other employees founded the Tempe Bus Operators Committee (TBOC). Before and after the January 11 elections, TBOC supported the Union. In August 2001, however, after McGiffin was removed as a union steward and negotiator, TBOC became a dissident employees group. As discussed below, on March 27, 2001, the Respondent discharged Lima, and on January 4, 2002, McGiffin was discharged. The complaint in this case alleges that both Lima and McGiffin were discharged in violation of Section 8(a)(1), (3), and (4). The judge recommended dismissal of the allegations. Only the Charging Parties have filed exceptions.

1. The discharge of Lima

On March 22, 2001, the bus that Lima was driving was involved in an incident with a tow truck. The truck driver reported to his employer that the bus hit the truck, and the towing company reported the incident to the Respondent. Later that afternoon, Lima met with Ron Jacobs, the Respondent's operations manager, who was investigating the incident. After inspecting the bus, examining Lima's Vehicle Inspection Report (VIR), and taking pictures of the bus, Jacobs asked Lima why he

[1] The Respondent moved to strike the Charging Parties' exceptions in their entirety or, alternatively, to strike various portions of those exceptions. We deny the Respondent's motion to strike the Charging Parties' exceptions in their entirety, but we shall grant the motion to strike the following portions of the exceptions:

(a) Portions that are not supported by record evidence: all but the first four sentences of Exception 1; references in the third and fourth sentences of Exception 2 to an alleged August 27, 2000 meeting between McGiffin and city officials; the Charging Parties' appended Exhibits 4 and 5; and allegations in the second through nineth sentences of Exception 10 to an antiunion campaign by the Respondent.

(b) Portions that duplicate arguments made in the appended brief: the argument in Exception 1 that the purpose of the December 12 meeting was the Tempe Bus Operators Committee (TBOC) work stoppage; the argument in Exception 1 that McGiffin did not intend to interfere with the Respondent's contracts at the December 12 meeting; the argument in Exception 5 that the December meeting was not aimed at contractual interference; arguments in Exceptions 4, 6, and 7 concerning the nature of Ward's inquiries and whether cooperation was voluntary; and the argument in Exception 10 that the Respondent made antiunion statements before the election.

(c) Portions that go beyond the General Counsel's theory of the case: the argument in Exception 1 that McGiffin's question to O'Connor was framed in the past tense; the argument in Exception 3 that McGiffin failed to cooperate because he "had no part in the things alleged;" the argument, implicit in the 5th sentence of Exception 3, that McGiffin refused to answer Ward's questions because Ward was inquiring about protected TBOC activities; and the argument in Exception 9 that McGiffin's intentions were not stated on the TBOC flyer.

[2] The Charging Parties implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

didn't report the accident.[3] Lima replied, "I didn't hit the vehicle." In his report, Jacobs noted that the bus' left side rear fender was separated from the body by about three inches. Based on his investigation, Jacobs concluded that Lima hit the tow truck.

That evening, when Lima finished his shift, he filled out an accident report and took a drug test (which he passed). Later that evening, Lima was told he was suspended and to report to a March 27 meeting.

On March 27, Jacobs talked with Assistant General Manager Marion Putnam about his investigation, including his conclusion that Lima hit the tow truck. The same day, Lima and his representative, McGiffin, met with Putnam and her associate, John Philpot. After that meeting, Putnam discharged Lima for failing to report an accident, in violation of company policy.

Also, on March 27, Lima was hired by ATC-Vancom, Inc., another subdivision of the Respondent's parent company.[4]

The complaint alleges that Lima was discharged because he formed, joined, and assisted the Union, filed an unfair labor practice charge against the Respondent, and engaged in dissident union activities with TBOC. In adopting the judge's recommended dismissal of the complaint allegations related to Lima's discharge, we agree that a preponderance of the evidence fails to show the Respondent's decision to discharge him was unlawfully motivated. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden to prove that animus against an employee's protected conduct was a substantial or motivating factor in a decision to discharge the employee. The Charging Parties contend that this "antiunion animus"[5] can be inferred from the circumstances surrounding Lima's discharge. We have examined each of their arguments and find no compelling basis to infer from those circumstances that Lima's discharge was motivated by hostility to his protected conduct.

The Charging Parties first contend that neither Jacobs nor Putnam "interviewed" Lima after March 22, as required by the Respondent's policies. We reject the contention. Initially, we note that Lima was discharged because he did not report the accident. By contrast, the need to investigate or interview concerned the accident itself. Further, even as to the accident itself, the Respondent did inquire. The record reveals that Jacobs listened to Lima's version of the events of March 22, as did Putnam.[6] Jacobs, whom the judge broadly credited, also questioned the truckdriver and inspected the bus, as well as Lima's VIR form. The tow truckdriver, whom the judge found to be a credible witness, testified that Lima's bus hit his truck. Although Jacobs' investigation may have been less than ideal, there is no persuasive evidence that any shortcomings in the investigation were motivated by animus against the Union. Likewise, although Jacobs' conclusion that Lima was involved in an accident may have been questionable (as the judge acknowledged), there is no persuasive evidence that the conclusion, or Putnam's reliance on it, was tainted. That the conclusion may have been incorrect does not establish an unlawful motive, on this record. See *Yuker Construction*, 335 NLRB 1072, 1073 (2001).

We are also unpersuaded by the Charging Parties' other arguments. Although Lima had not been disciplined before he was terminated (other than the suspension that immediately preceded his termination), his discharge was consistent with the Respondent's treatment of other drivers who failed to report accidents. And the fact that Lima was hired by another ATC subsidiary the very day he was discharged undercuts the Charging Parties' contention that he was singled out for especially harsh treatment because of his protected conduct.

Nor does Putnam's reliance on factors other than Lima's failure to report an accident indicate unlawful motive. Given Jacobs' investigative report concluding that an accident had occurred, Putnam's description of Lima's conduct on March 22 as "hit and run" and "leaving the scene of an accident" was an apt characterization of the facts as the Respondent believed them to be, and not inconsistent with Lima's failure to report the incident with the tow truck. More to the point, Putnam testified that Lima's "not reporting the accident was my prime concern—not the damage to the bus, not anybody else, the fact that he did not report the accident is a violation of policy." Further, Putnam's testimony is consistent with Lima's own affidavit, in which he states that his failure to report was *the* reason given for his termination.

[3] The VIR is a report filed at the beginning of a shift. The accident happened later that day.

[4] Member Schaumber does not rely on the fact that Lima was hired by another subdivision of the Respondent's parent company as evidence of a lack of animus in the absence of evidence that the Respondent was involved in some way in the hiring decision.

[5] Member Schaumber questions whether the Board should continue using the term "anti-union animus" and adopt in lieu thereof a term such as "Section 7 animus." The term "anti-union animus" is confusing. The words in isolation and out of historical context can be construed to mean opposition to antiunion activities. They can also be, and sometimes are, construed to mean opposition to unionization. Opposition to unionization, however, is not unlawful. What is unlawful is an employer's active opposition to and animus toward the Sec. 7 activities of its employees.

[6] The record does not reflect the difference between an "interview" within the meaning of the Respondent's rules and the questioning conducted by Jacobs and Putnam.

For the foregoing reasons, we affirm the judge's finding that Lima's discharge was not unlawful.

2. The interrogation and discharge of McGiffin

As set forth above, in August 2001, after McGiffin was removed as a union steward and negotiator, the TBOC became a dissident employee group. Thereafter, the TBOC worked against what it claimed was collusion between the Union and the Respondent.

In an effort to gain outside support and inform city officials about TBOC activities, McGiffin met with Tempe city officials several times in the summer and fall of 2001. The December 12, 2001 meeting included the mayor and city council members, O'Connor and Cahill. At the meeting, McGiffin distributed copies of a flyer announcing a proposed work stoppage. The flyer stated, in relevant part:

> AT A TBOC MEETING ON 12–10–2001, THE MEMBERS VOTED UNANIMOUSLY TO TAKE ACTION TO PROTECT AND FURTHER OUR OWN INTERESTS. THIS ACTION WILL BEGIN WITH AN ORGANIZED WORK STOPPAGE
>
> THE TBOC STOP WORK MEETING IS A TOOL TO ACHIEVE THE FOLLOWING ENDS. (Emphasis in original.)
>
> 1. TO SHOW OURSELVES AS AN ORGANIZED ALTERNATIVE TO ATC TEMPE EITHER AS CITY EMPLOYEES, OR AS AN ALTERNATE SERVICE PROVIDER.[7]
>
> 2. TO PROVIDE PROTECTION FOR OUR MEMBERS AGAINST COMPANY RETALIATION.
>
> 3. TO TAKE BACK OUR RIGHTS OF REPRESENTATION FROM THE ATU.

McGiffin testified that he also asked Council Member O'Connor if the council had ever "discussed whether or not they had considered taking the service in-house" (i.e., whether the city government had ever considered hiring bus drivers directly, and making them city employees, rather than subcontracting their work to the Respondent).

The Respondent learned from city officials of McGiffin's activities and sought to investigate. On January 2, 2002, McGiffin was called into a meeting with Mark Ward, the Respondent's general manager, and Charles Perlman, a supervisor. Ward read McGiffin the contents of a letter dated December 31, 2001, addressed to McGiffin, which stated in relevant part:

> Please be advised we have reason to believe that you have attempted to interfere with the contractual relationship which ATC Forsythe enjoys with Tempe, and furthermore have engaged in the disparagement of ATC Forsythe and other unprotected activities. Such action on your part is clearly grounds for discipline, up to and including discharge. Accordingly, this is your opportunity to tell us your side of the story with regards to such actions on your part. Such statement, should you decide to tender it to us, should consist of any and all facts, documents, memos, letters, writings, recordings, or anything else we feel we should consider before making a final decision with regard to your employment status.
>
> Obviously, in the event you fail and/or refuse to provide me with a statement setting forth facts as well as evidence in support of your position telling your side of the story, I will be left with no choice but to make a determination regarding your future employment status based upon the facts and allegations now before me.

McGiffin refused to respond to this request for information and was suspended. Two days later McGiffin again refused to give Ward the requested information, and his suspension was converted to a discharge. The credited testimony of Respondent's general manager Ward is that McGiffin's refusal to cooperate with the investigation was the only reason for his discharge.

The complaint alleges that McGiffin was discharged because he formed, joined, and assisted the TBOC and because he met with city officials on or about December 12, 2001, to discuss terms and conditions of employment. The judge recommended dismissal of the allegations relating to McGiffin, finding a complete absence of evidence of animus against McGiffin or TBOC.[8]

We agree that a preponderance of the evidence shows that McGiffin was discharged because he refused to cooperate with the Respondent's investigation into his activities that were not protected by Section 7 of the Act, and not because he engaged in protected activities. McGiffin testified that he included Item 1 in the TBOC flyer with an intention to take business from the Respondent. He also admitted that his question about "taking the service in house" was prompted by Item 1's prescription that TBOC should present itself as an alternate service provider to the Respondent. Because the object of the flyer's Item 1 (the question about "taking the service in house") and related discussions with the city council members was, by McGiffin's own admission, the eventual replacement of the Respondent by TBOC, McGiffin's overture to contractual interference was unprotected. See *Kenai Helicopters*, 235 NLRB 931, 936

[7] This item in the TBOC flyer is referred to below as "Item 1."

[8] McGiffin's action in filing an unfair labor practice charge in 2000 preceded his discharge by 17 months.

(1978); *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 54 (1977).

Further, because McGiffin's attempted contractual interference was unprotected, he enjoyed no statutory right to refuse to cooperate with the Respondent's investigation into his conduct. Accordingly, we affirm the judge's finding that the Respondent's discharge of McGiffin, for refusing to cooperate with the investigation, did not violate the Act.

Nor do we find that the Respondent unlawfully interrogated McGiffin. The first sentence of Ward's letter makes it clear that the Respondent was seeking to establish whether McGiffin was engaged in unprotected contractual interference and disparagement. The remainder of the letter merely seeks to gain information about those matters. As the judge found, the Respondent's inquiry was aimed solely at McGiffin's unprotected activities. We therefore find (as the judge implicitly did) that this investigation did not interfere with McGiffin's Section 7 rights.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN concurring.

After careful consideration of the Charging Parties' exceptions, I concur in the dismissal of the complaint. Based on the judge's credibility determinations, I agree that the General Counsel has not proved by a preponderance of the evidence that the discharges of Lima and McGiffin were unlawfully motivated.

While direct evidence of unlawful motivation is not required in every case, and antiunion animus certainly may be inferred from surrounding circumstances, I am not persuaded that such an inference is warranted in Lima's case. Rather, persuasive to me are the facts that Putnam testified that Lima's failure to report the incident was the reason for his discharge, that Lima's affidavit states that failure to report was the reason given for his termination, and that Lima was hired the same day by a related subsidiary of the Respondent.

As to McGiffin, the complaint alleged that he was discharged because he formed, joined, and assisted the TBOC and because he met with city officials on or about December 12, 2001, to discuss terms and conditions of employment. The credited testimony of Respondent's General Manager Ward is that McGiffin was discharged because he refused to cooperate in an investigation of his December 12 meeting with Tempe city officials.

To the extent that McGiffin's activities at the December 12 meeting were unprotected, his discharge for refusing to answer questions about that activity was certainly lawful. However, the General Counsel did not argue that McGiffin had a right to refuse to answer Ward's questions about contractual interference because he could not answer those questions without also revealing his protected TBOC activities. See *Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971) (holding that employees have the right to remain silent to protect the secrecy of their protected activities).

Accordingly, I concur in the dismissal of both the Lima and McGiffin discharge cases.

Dated, Washington, D.C. March 30, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Nathan Albright, Esq., for the General Counsel.

James N. Foster Jr. and *Geoffrey M. Gilbert Jr., Esqs.*, of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Phoenix, Arizona, on April 8, 9, and 10, 2002, on the General Counsel's consolidated complaint alleging that the Respondent unlawfully terminated the Charging Parties in violation of Sections 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. §151, et seq.[1]

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that the Charging Parties were terminated for a cause.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

The Respondent is a Delaware corporation with offices and a place of business in Tempe, Arizona, where it is engaged in the business of operating a public transportation system under contract with, and on behalf of, the City of Tempe. During the

[1] In other cases consolidated with the above-captioned the three individuals allegedly terminated unlawfully reached a settlement with the Respondent and asked that withdrawal of their charges be approved. I approved the withdrawal of the charges in Cases 28–CA–17117 and 28–CA–17366 and ordered that the complaint allegations based on these charges be severed from the above-captioned cases and dismissed.

course and conduct of this business, the Respondent annually derives gross revenues in excess of $250,000 and annually purchases and receives directly from outside the State of Arizona, goods, products, and materials valued in excess of $50,000. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Notwithstanding that Local 1433, Amalgamated Transit Workers Union, AFL–CIO (the Union) was certified as the employees' bargaining representative following a Board conducted election, the Respondent denied that it is a labor organization within the meaning of the Act. Since the Union in fact represents employees of the Respondent for purposes of collective bargaining, I conclude that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Although there had been an unsuccessful attempt to organize the Respondent's drivers in 1999, the events here arose out of a campaign which began in June 2000 when certain employees met with the Union's president and other officers. There was a representation petition, a hearing, and an election, which was held on January 11, 2001. The Union was certified as the bargaining representative for the Respondent's approximately 200 unit employees. Thereafter, the Respondent and the Union conducted collective-bargaining negotiations and a contract was reached and ratified on January 20, 2002.

Paralleling this organizational effort, and apparently to facilitate it, some of the drivers also formed the Tempe Bus Operators Committee (TBOC). The principal leader of TBOC was Eugene McGiffin. Lino (George) Lima testified that he also was involved and on behalf of TBOC and met on three occasions with members of management. It is unclear how many of the bargaining unit employees were involved in TBOC.

After the Union's certification, McGiffin was appointed a shop steward and was a member of the negotiating committee; however, sometime in the summer of 2001, he was relieved of both duties, apparently in a dispute with union officers over the course of negotiations for a collective-bargaining agreement.

Thus, McGiffin wrote a number of flyers directed to other drivers criticizing the Union. Further, on behalf of TBOC he met with Tempe city officials for the purpose of having the city either hire the Respondent's drivers as city employees or contracting with TBOC and canceling its contract with the Respondent. These meetings occurred in December 2001. When questioned by management about what he was doing, McGiffin commented that it was none of their business. On January 4, 2002, McGiffin was discharged for failure to cooperate with the Respondent's investigation into his activities on behalf of TBOC vis-à-vis the City of Tempe.

On March 22, 2001, Lima was involved in an incident while driving his assigned bus. As will be discussed in more detail below, the driver of a tow truck claimed that Lima had cut in front of him in such a way as to damage the tow truck's right front bumper and the left rear bumper of the bus. The tow truck driver made this claim to Lima, who maintained there was no contact, and to his company. Thus, the Respondent sent and investigator to intercept Lima and the investigator concluded that there had been an accident. On March 29 Lima was discharged for failing to report the accident.

B. Analysis and Concluding Findings

1. The discharge of Lino (George) Lima

The General Counsel alleges that Lima was discharged in violation of Section 8(a)(4) because he had filed a charge in 2000 relating to alleged threats a then supervisor had made to employees. It is also alleged that Lima's discharge was violative of Section 8(a)(3) because he was active on behalf of the organizational campaign leading to the Union's certification, and finally, because he was active on behalf of TBOC.

Missing here are some of the usual factors tending to prove that a discharge was unlawfully motivated. There is no evidence of animus against the Union or those who were its principal proponents. Indeed, the day after his discharge, Lima was hired by another division of the Respondent. There is no indication that the Respondent engaged in unlawful activity during the organizational campaign (or the one which resulted in no certification of representative in 1999) other than one allegation of a threat by a former supervisor in June of 2000. In a bargaining unit of 2000, surely others as well as Lima were active and were known to be so. There is no evidence of retaliation against anyone other than Lima and McGiffin.[2] Such activity as Lima engaged in which the General Counsel alleges motivated the Respondent to discharge him was, by the time of his discharge, was fairly stale. The organizational campaign had ended some months previously and the parties were in negotiations. There is simply no evidence to suggest why the Respondent would offer the incident of March 22 as a pretext to disguise an unlawful motive in discharging Lima.

There is some evidence on which the Respondent could form a good-faith belief that Lima was in fact involved in a minor accident which he failed to report and there is a strong basis for the Respondent's policy that all accidents, however minor, must be reported. Such insures early investigation and would tend to limit the Respondent's liability.

The tow truck driver is apparently disinterested in this proceeding, and he testified to the facts of accident as he reported them to his management. The General Counsel offered no reason why the tow truck operator would fabricate a story that he had been cut off and hit by Lima's bus. Further, the tow truck operator appeared to be a credible witness.

Similarly, the Respondent's investigator, John Jacobs, left his employment with the Respondent under less than cordial circumstances. Thus, he too must be considered disinterested. He testified that his investigation revealed that in fact Lima had run into the tow truck. While his investigation was not as definitive as it might have been, there is no reason to conclude that any omissions were in an attempt to cause discipline of a union activist. Again, he appeared to be a credible witness.

[2] As noted, there were three other alleged discharges which were settled prior to the hearing. There is no evidence in the record concerning the facts of these discharges.

Nevertheless, there are facts which tend to disprove that the alleged accident was the reason Lima was discharged. First, even if the incident occurred as testified to by the tow truck driver, it was trivial. Beyond that, objective evidence tends to support Lima that in fact there was no contact between the bus and the tow truck.

Jacobs testified that he looked at the vehicle inspection report on the bus and noted that there was no indication of prior damage to the bumper. But Lima testified that he filled out a vehicle inspection report prior to taking the bus for his shift and noted on it that there was minor damage to the bumper. That report is missing and no one seems able to explain why.[3] Lima's testimony is supported by a report in evidence which was written by another driver early in the morning of March 22. This report notes the prior damage. Thus the objective evidence supports Lima's statement to the Respondent's management (and his testimony here) that there was no accident—that damage to the bus tending to prove there was an accident, was preexisting.

However, in concluding that there was an accident which Lima failed to report, management chose not to believe Lima and relied, apparently, on the report of an investigator who in turn relied on a report from the tow truck operator. I find that the investigator erred in concluding that there had been no prior damage to the bus. Prior evidence of damage to the bus bumper was critical in determining whether in fact there had been contact between the bus and the tow truck. I believe that Jacobs erred in concluding that there in fact had been an accident, however minor.

It may be the Respondent's policy that drivers must report accusations of accidents, even where none occurs, so that the Respondent can properly defend itself. But such is not the Respondent's contention. The Respondent contends it discharged Lima for having an accident he did not report, where a reasonable investigation might well have demonstrated that there was in fact no accident.

The question then is whether the Respondent's managers made a mistake, overreacted or used the incident of March 22 to discharge unlawfully a known union activist. I conclude that the evidence is insufficient to support a finding that the discharge was unlawfully motivated. As noted above, there is no evidence of animus against the Union, TBOC, or Lima. In fact, the day after his discharge, Lima was hired by another division of the Respondent, which tends to negate any kind of motive by the Respondent to rid itself of Lima because of his union activity. Finally, the mere fact that one event follows another does not in itself prove a causal connection between them. I simply cannot conclude that there was a nexus between such union activity as Lima may have engaged in (or filing a charge with the Board) and his discharge.

Accordingly, I conclude that the General Counsel failed to prove that Lima was suspended and discharged in violation of Section 8(a)(1), (3), or (4) of the Act, and I shall recommend that this allegation be dismissed.

[3] I do not accept the Respondent's assertion that it was destroyed in normal course of business after 90 days and that such was Lima's fault for having waited 98 days to file a charge. Certainly the Respondent would have been on notice that the discharge of Lima might well result in litigation and the report might well be material evidence.

2. The discharge of Eugene McGiffin

Eugene McGiffin was the principal leader of TBOC, and, apparently, the Union's successful organization of the Respondent's employees. McGiffin was made a steward and was on the negotiating committee. As a steward, he represented Lima during the investigatory interview leading to Lima's discharge.

However, sometime in the summer of 2001, McGiffin became disenchanted with the Union's leadership (or vice versa or both) and he was stripped of his positions. He then began generating flyers on behalf of TBOC addressed to the Respondent's drivers stating his opinion that the Union was not adequately representing employees in negotiations.

TBOC had a meeting on December 10, and, according to a flyer drafted by McGiffin, unanimously voted to have a "stop work meeting Sunday[,] January 6th." McGiffin went on to state:

> THE TBOC STOP WORK MEETING IS A TOOL TO ACHIEVE THE FOLLOWING ENDS.
>
> (1) TO SHOW OURSELVES AS AN ORGANIZED ALTERNATIVE TO ATC TEMPE EITHER AS CITY EMPLOYEES, OR AS AN ALTERNATE SERVICE PROVIDER.
>
> (2) TO PROVIDE PROTECTION FOR OUR MEMBERS AGAINST COMPANY RETALIATION
>
> (3) TO TAKE BACK OUR RIGHT OF REPRESENTATION FROM THE ATU.

During December, McGiffin met with members of the Tempe city council, though not in council session, to discuss the possibility of the drivers either becoming city employees or the TBOC obtaining the contract to provide bus service for the city.

The Respondent learned of this activity and sought to investigate what McGiffin was doing. McGiffin, however, refused to cooperate and, according to General Manager Mark Ward, was discharged for this reason. McGiffin concurred that on January 3, he was taken to a meeting with Ward during which Ward asked about these events and McGiffin said he "had no information to give" Ward. In a letter dated January 3, and given to McGiffin on January 4, Ward stated that McGiffin said that "business of The Tempe Bus Operators was none of your (my) business." The letter went on to recite that McGiffin was then placed on suspension, and, on January 4 was discharged since he failed and refused to cooperate in the Respondent's investigation.

The General Counsel argues that McGiffin's refusal to cooperate in Ward's investigation of his activity in contacting city officials was necessarily bogus since Ward's December 31, 2001 letter to McGiffin made his cooperation voluntary. Counsel for the General Counsel reaches this conclusion from the following emphasized language in the letter:

> Accordingly, this is your opportunity to "tell us your side of the story" with regard to such actions on your part (attempting to interfere with the Respondent's contract with the City of

Tempe). Such a statement, *should you decide to tender it to us* . . . .

I reject this argument. The totality of the letter of December 31, the meeting between Ward and McGiffin on January 2, 2002, and Ward's letter of January 3 make clear McGiffin's cooperation was not an option. Based on McGiffin's memo, the Respondent had substantial reason to believe that McGiffin was attempting to interfere with its contractual relation with Tempe. Such was a matter of serious concern.

The General Counsel argues that McGiffin's activity on behalf of TBOC was concerted and protected by the Act. Therefore, the Respondent's "investigation" of what McGiffin was doing was not permissible, or at least, the Respondent could not lawfully discharge McGiffin for refusing to answer questions concerning this activity.

The Respondent maintains that attempting to interfere with the Respondent's contract with the city of Tempe was unprotected and it is this which the Respondent sought to investigate. I agree.

I conclude that McGiffin's activity in contacting the city of Tempe suggesting that the city either hire the Respondent's drivers as city employees, or contract with TBOC was not activity protected by the Act. This was not, as suggested by the General Counsel, a mere attempt to seek outside help in resolving a labor dispute. There was no dispute between the Union and the Respondent. The dispute was between McGiffin and the Union.

In any event, McGiffin's stated intention to have the city cease doing business with the Respondent was a matter of substantial, and legitimate, concern to the Respondent. Notwithstanding that employees act in concert, where they attempt to become competitors of their employer, or attempt to undermine their employer's contractual relationship with another, their activity is not protected. That is, such actions by employees amount to disloyalty within the holding of *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953). See, e.g., *Kenai Helicopters*, 235 NLRB 931 (1978) (discharge of an employee for attempting to divert the company's business to a competitor lawful); *Associated Advertising Specialists, Inc.*, 232 NLRB 50 (1977) (discharge of an employee for attempting to take from company its best customer lawful). I therefore conclude that the particular activity of McGiffin which Ward sought to investigate was outside the protection of Section 7. I conclude that the suspension and discharge of McGiffin for refusing to cooperate was lawful.

Further, I conclude that McGiffin's previous protected activity on behalf of the Union and in filing a charge along with Lima in 2000 were not the motivating causes of his discharge. As noted above, there is no evidence of general animus toward the Union, TBOC, or any employees' union or other concerted activity. Further, McGiffin had made his dissatisfaction with the Union was known for some months, yet there is no indication that such was a matter of concern to the Respondent. Only when the Respondent learned that McGiffin had met with officials of the city did the Respondent seek to learn what was going on.

I therefore conclude that the General Counsel failed to prove that McGiffin was suspended and discharged in violation of Sections 8(a)(1), (3) or (4) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed in its entirety.

Dated, San Francisco, California, June 27, 2002

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.